

The Honorable James L. Robart

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION, a Washington  
corporation,

Plaintiff,

v.

MOTOROLA, INC., and MOTOROLA  
MOBILITY, INC., and GENERAL  
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

MOTOROLA MOBILITY'S AND  
GENERAL INSTRUMENT'S REPLY  
TO MOTOROLA'S *DAUBERT* MOTION

**NOTED ON MOTION CALENDAR:  
September 10, 2012**

**ORAL ARGUMENT REQUESTED**

**REDACTED**

MOTOROLA MOBILITY, INC., and  
GENERAL INSTRUMENT CORPORATION,

Plaintiffs/Counterclaim Defendant,

v.

MICROSOFT CORPORATION,

Defendant/Counterclaim Plaintiff.

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REPLY TO MOTOROLA'S *DAUBERT* MOTION  
CASE NO. C10-1823-JLR

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1 Defendants (collectively “Motorola”) respectfully submit this Reply in response to  
2 Microsoft’s Opposition to Motorola’s *Daubert* Motion.<sup>1</sup>

### 3 **I. INTRODUCTION**

4 Microsoft concedes that, in the real world, many – if not most – SEP licenses result from  
5 bilateral negotiations, and that bilateral *ex post* agreements are “commonplace” and “clearly  
6 contemplated” by SSOs. (Dkt. No. 410 at 13-14.) Despite this, Microsoft’s experts (none of  
7 whom has negotiated a license) opined in their reports that RAND terms should be determined  
8 through some undefined multilateral, *ex ante* “methodology” that lacks a real-world analog. (*See*,  
9 *e.g.*, Ex. 7 at 2, 17; Ex. 5 at 7, 27; Ex. 6 at 2, 3.) Notably, Microsoft’s experts did not perform  
10 their multilateral, *ex ante* analysis, nor did they explain how the Court should do so. This is not  
11 surprising. Microsoft’s multilateral, *ex ante* methodology is a purely theoretical construct that  
12 cannot be practically implemented in the real world.

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] Consistent with  
16 this concession, Microsoft in its brief now retreats to arguing that RAND should be viewed from  
17 an equally vague multilateral, *ex ante* “perspective.” (*See, e.g.*, Dkt. No. 410 at 5, 13.) This  
18 positions Microsoft even further from the real-world realities of RAND licensing negotiations. No  
19 matter what Microsoft calls it, its multilateral, *ex ante* approach has no counterpart in the real  
20 world. Trying to determine RAND terms through the “lens” or “perspective” of Microsoft’s  
21 approach is meaningless and will not lead to reliable results.

22 Microsoft tries to justify its undefined “methodology” by arguing that its multilateral, *ex*  
23 *ante* “perspective” would address certain theoretical licensing “risks” identified by its economic

24  
25 <sup>1</sup> “Ex. \_\_\_\_” refers to the stated Exhibit to the Declaration of Samuel L. Brenner, submitted on August 27, 2012,  
26 (Dkt. No. 392), or Second Declaration of Samuel L. Brenner, submitted on September 5, 2010 (Dkt. No. 406). “Wion  
Ex. \_\_\_\_” refers to the stated Exhibit to the Declaration of Christopher Wion, submitted by Microsoft on August 27,  
2012 (Dkt. No. 398). “Wion II Ex. \_\_\_\_” refers to the stated Exhibit to the Declaration of Christopher Wion, submitted  
by Microsoft on September 5, 2012 (Dkt. No. 408). All emphasis is added unless otherwise indicated.

1 non-licensing experts. (*See id.* at 3.) But Microsoft in its Opposition and its experts in deposition  
2 point to no evidence that these “risks” have resulted in actual problems in the real world or, more  
3 specifically, in Motorola’s extensive group of standard essential patent (“SEP”) licenses. Nor do  
4 Microsoft or its experts point to an example of Motorola (or, for that matter, anyone else) actually  
5 having licensed SEPs through Microsoft’s undefined multilateral, *ex ante* negotiation process. If  
6 those theoretical risks had been a real-world concern, one would expect that Microsoft’s  
7 multilateral, *ex ante* negotiation – and not a bilateral negotiation – would have become the  
8 predominant manner in which RAND terms are determined, and that SSOs long ago would have  
9 called for Microsoft’s multilateral, *ex ante* negotiations (and not bilateral negotiations, which, as  
10 the Court has noted, the SSOs “contemplate” or “envision” (*see* Dkt. No. 335 at 24, 18)).

11 In the end, Microsoft never had any intention of actually using its newly minted  
12 multilateral, *ex ante* “perspective.” Rather, the true purpose of Microsoft’s “perspective” is to  
13 justify the unsupported theory it has advanced from the very start of this case – that RAND terms  
14 in this case should be defined by the artificially low pool rates of MPEG LA and Via Licensing.  
15 But these pools are not reliably what Microsoft calls “surrogates” for such a negotiation. These  
16 patent pools are not *ex ante* because they were entered into after the standard was adopted and  
17 prospective implementers had sunk costs into standard compliance. They are also not  
18 “multilateral” because they do not reflect full participation by all licensors and potential licensees

19 [REDACTED].

20 Microsoft’s experts did not explain what Microsoft’s multilateral *ex ante* negotiation  
21 should be, nor did they attempt to analyze or implement it in this case. Accordingly, Microsoft’s  
22 attempt to declare that patent pool rates, and nothing else, are RAND by analogizing them to its  
23 multilateral, *ex ante* negotiation should be rejected and expert testimony on this unreliable,  
24 unexplained and unimplemented “methodology” should be excluded.

**II. MICROSOFT'S REAL PURPOSE – TO RELY ON THE DEPRESSED RATES OF PATENT POOLS – UNMASKS THE UNRELIABILITY OF ITS UNEXPLAINED EX ANTE MULTILATERAL "METHODOLOGY"**

Microsoft's experts in their reports (1) do not explain what Microsoft's multilateral, *ex ante* negotiation would actually look like, (2) do not point to any instance of Microsoft's envisioned negotiation ever having taken place in the real world, and (3) do not even attempt to perform such an analysis. None of this comes as a surprise. Microsoft's multilateral, *ex ante* methodology is a figment of its economic experts' imaginations and cannot be practically implemented in the real world. If Microsoft's experts believe that RAND terms should be determined using Microsoft's multilateral, *ex ante* methodology, Microsoft's experts should have applied that methodology. They did not, and this failure alone should preclude them from introducing any testimony regarding implementation or consideration of that "methodology."

Rather than apply its multilateral *ex ante* "methodology," Microsoft self-servingly uses this elusive "methodology" as a springboard to coyly introduce the MPEG LA and Via Licensing patent pools (and their depressed royalty rates) as "surrogates" for an *ex ante* multilateral "perspective." Make no mistake – Microsoft's transparent litigation goal is to persuade the Court to adopt these low pool rates. But the pools are not reliable "surrogates" because they are neither "multilateral" nor "*ex ante*" as defined by Microsoft.

As Motorola explained in its opening brief (and as Microsoft did not contest in its Opposition), Microsoft's experts appear to require that RAND terms be the result of a multilateral negotiation [REDACTED]

[REDACTED] Indeed, Microsoft confirmed in its Opposition that its multilateral negotiation [REDACTED]

[REDACTED] But nowhere do Microsoft's experts explain how to do this, or attempt to do it for the Court. Instead, they simply leap to the conclusion that pools are such negotiations, and pool rates therefore should be adopted as RAND.

But the MPEG LA and Via Licensing pools are not "multilateral" as Microsoft has defined

1 it. For example, the Via Licensing patent pool, which neither Motorola nor Microsoft has joined  
 2 (and which lacks participation from a meaningful percentage of the industry), only has 5 licensors.  
 3 This is a far cry from the hundreds of holders of SEPs essential to the 802.11 standard and the  
 4 thousands of companies that are implementers of the standard. (*See* Ex. 5 at 15.) Such a small  
 5 participation cannot provide the multilateral “perspective” – whatever that is – that Microsoft’s  
 6 experts believe is necessary.

7 As for the MPEG LA patent pool, Microsoft notes that it *currently* has over 1,000  
 8 licensees and licensors (Dkt. No. 410 at 6-7), but Microsoft’s experts presented no evidence that  
 9 all (or even many) of these companies were involved in a “multilateral” negotiation of the terms  
 10 for the MPEG LA agreement. To the contrary, it appears that only 20<sup>2</sup> of these companies were  
 11 involved in establishing the terms of the agreement, and that all others have had to accede to these  
 12 terms without an opportunity to negotiate. Again, such a small participation cannot justify the  
 13 “multilateral” benchmark that Microsoft’s experts proclaim is necessary.

14 Microsoft also requires that RAND terms be set *ex ante* – i.e., before the 802.11 and H.264  
 15 standards were adopted or widely implemented. (*Id.* at 1.) But neither of these pools is the result  
 16 of an *ex ante* process. In the case of Via Licensing, that pool agreement was established in 2005,  
 17 over ten years after the original 802.11 standard was adopted in 1994.<sup>3</sup> In the case of MPEG LA,  
 18 the H.264 standard was adopted in May 2003 and the terms for the MPEG LA H.264 pool were  
 19 agreed upon six months later in November 2003.

20 That the MPEG LA and VIA Licensing patent pools are not actually multilateral or *ex ante*  
 21 negates these pools as any kind of “surrogate.” Accordingly, the opinions of Microsoft’s experts  
 22 based on these pools are unreliable. In fact, even if these pools were the results of multilateral, *ex*  
 23 *ante* negotiations, they would still not be relevant in mirroring the real-world license negotiations  
 24

25 <sup>2</sup> *See* [http://www.mpegla.com/Lists/MPEG%20LA%20News%20List/Attachments/138/n\\_03-09-11\\_avc.html](http://www.mpegla.com/Lists/MPEG%20LA%20News%20List/Attachments/138/n_03-09-11_avc.html).

26 <sup>3</sup> Microsoft’s reliance on the IEEE 802.11 Patent Pool Exploratory Forum is misplaced. This exploratory forum is  
 just that – exploratory. And even in the future a pool emerges, the rates of such a pool would be set 20 years after the



envisioned or contemplated by Motorola's LOAs. As Motorola has previously explained, the formation of a patent pool is different from an arms-length bilateral negotiation, and the incentives and motivations for entering into a pool are very different from the incentives and motivations for entering into a bilateral license. (*See, e.g.*, Dkt. No. 393 at 12-13; [REDACTED].)

**III. STRIPPED OF THE FALSE ANALOGY TO PATENT POOLS, MICROSOFT'S INVOCATION OF A MULTILATERAL, *EX ANTE* "METHODOLOGY" IS UNJUSTIFIED HERE BECAUSE IT PURPORTS TO ADDRESS UNSUBSTANTIATED PROBLEMS**

Instead of explaining how to implement its multilateral, *ex ante* negotiation and how such an implemented negotiation should be analyzed by the Court, Microsoft instead resorts to economic theory. In particular, it argues that its theoretical multilateral, *ex ante* "methodology" addresses hold-up and stacking risks associated with SEP licensing. (Dkt. No. 410 at 3-4.) However, while avoiding hold up and stacking is desirable, Microsoft has presented no evidence that these are more than theoretical risks identified in academic literature. It is also plain that Motorola's IEEE and ITU RAND commitments do not require contracting parties to resort to Microsoft's undefined "methodology." If the SSOs do not require this methodology, it is unreasonable to impose it on Motorola, even if some academics think it might be a good idea to investigate in the future.

Microsoft's experts admitted during deposition that they have no evidence of a hold up or stacking problem in the real world. [REDACTED]

standard had been adopted and, therefore, would not be *ex ante*. And unless there is "full participation" of all potential 802.11 licensors and licensees (and there is no reason to assume there will be), it will not be multilateral.

1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]<sup>4</sup>

6 Thus, there is no evidence to support Microsoft's arguments that hold up and stacking risks  
 7 are "magnified" in the context of bilateral negotiations (Dkt. No. 410 at 4). Indeed, the lack of  
 8 evidence of hold up and stacking confirms that (1) existing RAND commitments prevent the  
 9 manifestation in the real world of these theoretical concerns and (2) bilateral negotiation works in  
 10 the real world and is a reliable and true methodology for determining RAND.

11 The writings Microsoft cites (Dkt. No. 410 at 8, 9) to support its *ex ante* multilateral  
 12 "perspective" are inapposite, in that they merely recognize the theoretical problems, but they do  
 13 not suggest that existing SSO policies require Microsoft's *ex ante* multilateral "methodology."

- 14 • While the 2011 FTC report Microsoft cites (Wion II Ex. 16) discusses the theory of hold  
 15 up and urges using the incremental value of patents in determining RAND, the Report also  
 16 endorses Motorola's conclusion that "Courts should apply the hypothetical negotiation  
 17 framework to determine reasonable royalty damages for a patent subject to a RAND  
 18 commitment." (*Id.* at 23.) And even if an incremental value approach is useful, none of  
 19 Microsoft's experts actually determines the incremental value of Motorola's H.264 and  
 20 802.11 patents. (*See* Dkt. No. 409 at 16.)
- 21 • Both the Swanson & Baumol article (Wion II Ex. 14) and Judge Posner's decision in the  
 22 *Apple v. Motorola* case embrace a purely theoretical approach that Microsoft has *not*  
 followed. (*See* Dkt. No. 409 at 5-6.) And as Motorola's expert, Dr. Schmalensee, points  
 out, such a theoretical approach is not practical in a setting in which there are many patents  
 and patent holders. (*See* Ex. 49 at 547; Wion Ex. 1 at 32:9-11 ("But I've said – then and  
 elsewhere – that you really can't use that approach in practice."))
- In his article on the so-called "patent thicket" (Wion II Ex. 15), Shapiro is writing about  
 what he believes are theoretical problems with the current patent system, rather than the  
 meaning of current RAND commitments to the IEEE or ITU. While he discusses various

23 <sup>4</sup> The fact that Microsoft's experts could not point to any evidence of a stacking or hold up problem is not  
 24 unexpected. As Motorola's licensing experts explained, stacking is not an actual problem in this case because  
 25 [REDACTED]  
 26 [REDACTED] Notably, no  
 Motorola licensee has complained of hold up.

1 *ex ante* considerations, he presents no empirical data purporting to show that hold up or  
2 stacking have been real-world concerns.

- 3 • The article by Lemley and Shapiro (Wion II Ex. 13) does opine (without real empirical  
4 evidence) that royalty stacking is a problem in the RAND context, but does *not* contend  
5 that the RAND commitment was intended to address stacking, or that RAND must or  
6 should be addressed through a multilateral *ex ante* “perspective.”<sup>5</sup>
- 7 • The Farrell et al. article (Wion II Ex. 12), which discusses theoretical “economic issues  
8 raised by” licensing of SEPs (*id.* at 607), presents an academic theory (*see id.* at 638) about  
9 how RAND could be interpreted, but does not assert that this theory is in fact what the  
10 RAND commitment binds parties to do. Indeed, the article acknowledges the difficulties  
11 and limitations of *ex ante* and collective negotiations. (*See, e.g., id.* at 630-31 (“[E]x ante  
12 negotiations appear to be relatively difficult and rare.”); *id.* at 634 (“[I]dentifying the limits  
13 on permissible collective negotiations is difficult . . . .”); *id.* at 634-35 (discussing different  
14 possible approaches to allowing for collective negotiations); *id.* at 643 (discussing “a  
15 natural if imperfect” rule that SSOs could adopt to account for royalty stacking).)

16 Nothing Microsoft has cited proves that its multilateral *ex ante* approach is reliable or  
17 acceptable, or that Microsoft’s approach was incorporated into the actual assurances that Motorola  
18 provided to the IEEE and ITU and that should be imposed on Motorola now.<sup>6</sup> And until such time  
19 as Microsoft’s theoretical approaches become an accepted method for determining RAND, they  
20 are just unsubstantiated, unreliable, undefined theories, which should not be used after-the-fact to  
21 impose new contractual commitments on parties which never agreed to them. *See, e.g., Chaffee v.*  
22 *Chaffee*, 145 P.2d 244, 252 (Wash. 1943) (“Neither abstract justice nor the rule of liberal  
23 construction justifies the creation of a contract for the parties which they did not make themselves  
24 or the imposition upon one party to a contract of an obligation not assumed.”).

25 <sup>5</sup> While the Lemley and Shapiro article purports to provide “empirical evidence” of royalty stacking (Wion II Ex. 13  
26 at 1994), the only “proof” the article offers is that there are many essential patents reading on various standards  
(*see id.* at 2025-29), and that “far from perfect” data (*id.* at 2035) suggests that there might be a problem. As Lemley  
and Shapiro themselves admit, “[i]t is not clear what the total cost of these stacked royalties [in the WCDMA context]  
is.” (*Id.* at 2026.) As Geradin, Layne-Farrar, and Padilla note, Lemley and Shapiro “do not present any *data* on  
royalty rates.” (Ex. 29 at 160; *see also id.* at 161-62 (“We find [Lemley and Shapiro’s case study about Wi-Fi] too  
speculative to establish evidence of a significant complements problem in Wi-Fi.”).)

<sup>6</sup> While the IEEE and ITU patent policies do not explicitly prohibit an *ex ante* multilateral negotiation, (or, indeed,  
anything else that would lead to RAND), it does not logically follow that the policies therefore demand use of  
Microsoft’s “methodology” or that hypothesizing such a methodology is reliable. Moreover, Motorola’s ETSI  
submission is inapposite. (Dkt. No. 410 at 4.) First, that proposal was directed to ETSI, rather than the IEEE or the  
ITU, the parties to the binding contracts in this case. Second, it was directed to the *cumulative* royalties that would be  
paid for *all* standards used by a product – not the single standard stacking “problem” discussed by Microsoft in its  
brief. Most importantly, the proposal was rejected by ETSI. The only possible conclusion is that no SSO – not even  
ETSI – has accepted the premises of that submission.

Microsoft's Opposition fails to show that its proposed multilateral, *ex ante* "methodology" is reliable. How can it be? It is a "perspective" without any real-world underpinning, contrived for the sole purpose of addressing problems that its own experts agree have not been demonstrated to exist, and it is entirely untethered to the policies underlying the actual contracts at issue in this case. *See, e.g., Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1313, 1318 (Fed. Cir. 2011).<sup>7</sup>

#### IV. THE ARTICLES CITED BY MOTOROLA DO NOT SUGGEST THAT SSOs ENDORSE AN *EX ANTE* MULTILATERAL METHODOLOGY

Contrary to Microsoft's suggestion (Dkt. No. 410 at 9), the industry and academic sources cited in Motorola's opening brief (Dkt. No. 393 at 6-7) do not suggest that the SSOs require determination of RAND terms through Microsoft's "multilateral *ex ante*" methodology. Indeed, as Microsoft's own careful wording demonstrates, these sources "discuss alternatives to bilateral negotiations," (Dkt. No. 410 at 9) insofar as some of the authors wish to see future changes in how the SSOs craft standards and RAND assurances. None of these sources suggests that Motorola's RAND commitments in any way require, or even envision, the prospective sorts of multilateral *ex ante* changes that Microsoft's experts opine SSOs should adopt in the future. For example:

- As demonstrated by the very section of the Geradin, Layne-Farrar, and Padilla article Microsoft cites (*id.* at 10-11), these authors discuss "proposals" and "policy recommendations" that have been put forward to address "the *perceived* complements problem within standard setting," (Ex. 29 at 147), but certainly do not suggest that these "proposals" are in fact required by existing RAND commitments. Indeed, these authors reach a telling conclusion: "considering both the scant evidence that royalty stacking and other complementary issues are widespread and recurring problems, along with the availability of several countervailing market responses, we find that were society to implement several of these policy recommendations it would risk setting a course for Scylla in the absence of any evidence of danger from Charybdis." (*Id.* at 176.)
- In their 2007 article (Ex. 31), Layne-Farrar, Padilla, and Schmalensee do consider theoretical extensions of the Swanson & Baumol model of *ex ante* auction, but ultimately

<sup>7</sup> The Entire Market Value Rule ("EMVR") and the 2003 InteCap analysis discussed in Microsoft's brief are irrelevant. As explained in Motorola's Opposition to Microsoft's *Daubert* motion, the EMVR has no applicability to licensing. (Dkt. No. 409 at 17-20.) And, the 2003 InteCap analysis is flawed because, among other reasons, (1) the current Motorola 802.11 patent portfolio is significantly larger than and substantively different from the short list upon which the InteCap analysis was based, (2) it was based on flawed market assumptions, and (3) it is inconsistent with Motorola's executed 802.11 licenses. (*See, e.g., Ex. 50* at 29-31.)

“do not argue that license fees should actually be set by either [of the theoretical approaches discussed] as it would be difficult, time consuming, and generally contentious to determine the incremental contributions of the many patents that are reported as essential to most standards.” (*Id.* at 705.) In a 2009 follow-up article, moreover, Dr. Schmalensee reaffirmed that the Swanson & Baumol model was not something that could be implemented in the real world. (*See* Ex. 49 at 547 (noting that “formal *ex ante* competition among potential licensors” is an approach that “is unlikely to be workable in practice.”)). Microsoft expert Dr. Simcoe expressly denied that he was suggesting an *ex ante* auction should even be used in this case. (Ex. 37 at 220:11-221:2.)

- In his 2011 article (Ex. 32), Mariniello, who believes that FRAND “is the outcome of a bilateral hypothetical negotiation between the licensor and the licensee,” (*id.* at 532), similarly explains that his proposed bilateral hypothetical negotiation “would take place *ex ante*” but would be “conditional on the information which is available *ex post*.” (*Id.*) This approach, moreover “comports well with the ‘hypothetical negotiation’ for reasonable royalty determination defined in the U.S. case *Georgia-Pacific*.” (*Id.* at 532 n.19.)
- The FTC’s Request For Comment (“RFC”) (Ex. 27) demonstrates that the FTC was considering ways to address some perceived problems in the SEP licensing process. The RFC thus – while recognizing that “[s]etting specific terms of [RAND] patent license[s] generally occurs in bilateral negotiations between the patent holder and individual standards users after the standard-setting process is completed,” (Ex. 27 at 28037) – asked questions about whether *ex ante* negotiations even or ever take place, and further asks “[w]hy are *ex ante* disclosures of licensing terms not required or made?” (*Id.* at 28038.) It follows that *ex ante* pricing models that the FTC was considering are **not** part of existing RAND commitments. Nokia’s comment (Ex. 26) in response to the RFC similarly discussed a proposal for changing the current RAND system, and did not purport to describe a feature of existing RAND contractual commitments. (*See id.* at 7.)

The materials cited by Motorola in its *Daubert* Motion (Dkt. No. 393 at 6-7) both demonstrate that the consensus in academia and industry is that RAND licenses are typically the product of bilateral *ex post* negotiation, and reflect the fact that, while academics have considered various theoretical problems and prospective solutions, there is simply no academic consensus that RAND commitments, as they actually exist, bind the contracting parties to terms that must or should be viewed through some sort of non-existent “multilateral *ex ante* lens” or “perspective.”

## **V. THE FACT THAT MOST SEP LICENSES RESULT FROM BILATERAL NEGOTIATIONS IS FURTHER PROOF THAT MICROSOFT’S METHODOLOGY IS UNRELIABLE**

In its Opposition, Microsoft admits that:

- “[M]any – even most – standard-essential patent licenses are the product of bilateral negotiations.” (Dkt. No. 410 13-14.)
- “[B]ilateral agreements are commonplace.” (*Id.*)

- “[M]any SSO intellectual property policies clearly contemplate bilateral negotiations of RAND terms and conditions.”” (*Id.* (quoting Dr. Simcoe’s opening report, Ex. 7 at ¶ 95).)

Microsoft’s experts have similarly observed that:

- “[B]ilateral negotiations are one way to reach a license on RAND terms and conditions. *It’s often used.*” (Ex. 37 at 159:24-160:2.)
- “[T]he fact” is “that we are going to rely mostly on bilateral negotiations to ultimately get you there [to RAND terms]” under “the backstop provided by the court . . . .” (Ex. 39 at 34:13-17; *see also* Ex. 10 at 2040:25-2041:6 (agreeing that “negotiations should be undertaken bilaterally between parties where standards are involved.”).)
- “The fair market value [of a portfolio of SEPs] is usually defined as a market transaction between a buyer and a seller . . . .” (Ex. 38 at 41:18-20.)

Contrary to Microsoft’s arguments (Dkt. No. 410 at 13-14), these admissions and statements *are* remarkable and relevant. They demonstrate that, in the real world, it is well accepted by SSOs and industry that RAND terms are determined through bilateral negotiations, not through some kind of unknown and undefined multilateral *ex ante* negotiation. And they confirm that the industry-validated, well-established, and accepted practice of reaching RAND agreements for Motorola’s SEPs through bilateral arrangements is a reliable and, indeed, the correct approach.

## VI. CONCLUSION

Unlike the modified *Georgia-Pacific* analysis employed by Motorola’s experts, which mirrors the real-world approach to RAND licensing, Microsoft’s multilateral, *ex ante* “perspective” is no more than a theoretical, unexplained construct premised on supposed problems that have not been shown to be actual problems in the real world. Confirming the unreliability of Microsoft’s approach, Microsoft’s experts do not point to any agreement that resulted from Microsoft’s actual multilateral, *ex ante* negotiation process, and they do not even attempt to analyze what Microsoft’s multilateral *ex ante* negotiation would have looked like *in this case*. And, fatal to Microsoft’s expert opinions, none of Microsoft’s experts purports to explain reliably what Microsoft’s multilateral *ex ante* negotiation is or how it is to be implemented by the Court. There is no such analysis or reliable methodology that would justify expert testimony at trial.

In reality, Microsoft’s unexplained multilateral, *ex ante* “perspective” is nothing more than



1 a stalking horse that Microsoft uses in attempting to bootstrap to patent pools, to rely on their  
2 depressed royalty rates. But this approach, too, is unreliable because patent pools are neither  
3 multilateral nor *ex ante*, and pools serve a different purpose than do arms-length licensing  
4 negotiations. Microsoft's multilateral, *ex ante* "methodology" has no real-world underpinning,  
5 and its experts' assertion of this unexplained and unapplied "methodology" should be excluded.

6 DATED this 10th day of September, 2012.

7 Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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MOTOROLA MOBILITY'S AND GENERAL INSTRUMENT'S  
REPLY TO MOTOROLA'S DAUBERT MOTION – 13  
CASE NO. C10-1823-JLR

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